Gurabo Lace Mills, Inc. *and* Union General de Trabajadores de Puerto Rico. Case 24–CA–4219

November 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, ZIMMERMAN, AND HUNTER

On March 19, 1981, Administrative Law Judge William F. Jacobs issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found and we agree that Respondent violated Section 8(a)(3) by issuing final written warnings to employees Ana Diaz and Isdoria Gomez to dissuade them from participating in union activities. We disagree, however, with the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) by issuing a final written warning to employee Octavio Rodriguez.

The essential facts are as follows:

Rodriguez played a significant role in the organizing campaign at Respondent's facility. He was a union adherent and discussed the Union with the employees on his shift. In May 1979[1] Rodriguez contacted the Union and obtained authorization cards. Some of these cards were distributed to the employees on the first shift and others were given to employee Paniagua to be distributed among the employees on the second shift. Rodriguez collected the signed cards from the employees on his shift. At the representation election which took place on July 17 Rodriguez acted as an observer for the Union.

On September 15, 1979, the following warning was issued to Rodriguez:

> FINAL WRITTEN WARNING
>
> TO: OCTAVIO RODRIGUEZ
>
> It has come to my attention that during working time you have been leaving the knitting department almost daily and going over to the area of the mill where Ana Diaz and Isdoria Gomez work. When you go over there you have been engaging in social conversation with these two girls and as such they have not been performing their work so that they can be responsive to you.
>
> This is the first time that this matter has come to my attention in view of my recent absence from the plant. However, I want to inform you that as a supervisor your main duty is to be present at all working times in the knitting department and to perform your basic duties there. Your continued and daily absences from this area, which have occurred almost daily for the past two months, must cease immediately.
>
> If you refuse to perform your job properly I will have no other choice but to discharge you.

This warning letter was presented to Rodriguez on September 18, by Gerald Scher, Respondent's president, in Scher's office. After reading the letter Rodriguez declared it was a lie and refused to sign it. Rodriguez was then told to return to work.

The Administrative Law Judge found that the warning was issued because of Rodriguez' activities in support of the Union and therefore was either violative of Section 8(a)(3) and (1) or Section 8(a)(1) depending on whether Rodriguez is an employee or supervisor. He noted that the Board previously held that Rodriguez was a supervisor in a representation case involving these parties.[2] Although such representation decisions are normally accorded "persuasive relevance and a kind of administrative comity"[3] the Administrative Law Judge rejected any reliance on the decision on the ground that the hearing in the representation case was "tainted" because Respondent's purpose in issuing final written warnings to Rodriguez, Gomez, and Diaz in September was in part to keep Rodriguez from possibly obtaining an agreement from Gomez and Diaz to testify on his behalf at the hearing to be held on Respondent's objection to the representation election, where Rodriguez' status would be examined. We disagree.

[1] All dates hereinafter are 1979 unless otherwise specified.

[2] 249 NLRB 658 (1980).

[3] *Serv-U-Stores, Inc.*, 234 NLRB 1143, 1144, (1978), in which the Board followed the court in *Amalgamated Clothing Workers of America [Sagamore Shirt Company]* v. *N.L.R.B.*, 365 F.2d 898 (D.C. Cir. 1966). The court, while holding that the supervisory issue raised in the representation case could be relitigated in an unrelated subsequent unfair labor practice proceeding, noted, at 905 that "[t]he findings of the Regional Director may be accorded 'persuasive relevance,' a kind of administrative comity, aiding the [Administrative Law Judge] and the Board in reaching just decisions, subject however to power of reconsideration both on the record already made and in light of any additional evidence that the [Administrative Law Judge] finds material to a proper resolution of the issue."

While it is true that the warnings were issued 2 days after Respondent received notice that a representation hearing would be held, there is nothing more in the record to support the Administrative Law Judge's finding that the warnings were issued for the purpose of influencing the outcome of the scheduled hearing rather than in retaliation for the employees' union activities. The timing of the warnings, standing alone, is insufficient evidence of such unlawful purpose. Accordingly, we find that the hearing in the representation case was not tainted.

We, therefore, deem it proper to consider the record and decision in the representation case as well as the evidence presented in this case in determining Rodriguez' status. Indeed, we shall accord persuasive relevance to the representation decision in view of the fact that a more complete record on the supervisory issue was made at the representation hearing than at the hearing in this case. In the representation case, Respondent adduced testimony from five unit employees. Here, Respondent refused to call witnesses on this issue and the only extended testimony on Rodriguez' status was adduced from Leonard Edelson who acted as the representative for Respondent.

In its representation case decision the Board found that:

> Rodriguez is responsible for the daily assignment of jobs to day-shift employees, assists employees when problems arise, makes necessary reassignments if an employee fails to show on either the day or night shift, and adjusts employee grievances. Further, since Esposito [the general manager] is at the plant only 2 days a week and as he is unable to converse in Spanish, the day-to-day management of the plant is necessarily handled at least in large part by Rodriguez. He is also immediately involved in the hiring process. As Esposito has no command of Spanish, Rodriguez interviews the prospective employees and, at a minimum, heavy reliance is placed on his recommendations concerning hiring. Also, in at least one instance—that involving Jesus Rivera—Rodriguez, after learning the Employer needed another employee, offered Rivera a job at a specified wage and Rivera accepted and went to work for the [Respondent] without prior clearance from Scher or Esposito. In view of the foregoing—and there is additional record evidence supporting the same result—we find that Rodriguez has the authority responsibly to direct employees, to hire and transfer them, and to adjust their grievances. [249 NLRB at 658–659.]

We find no evidence in this case to warrant a different determination. The Administrative Law Judge's finding that Rodriguez was an employee primarily rested on the following factors: Esposito, the general manager, was in charge of the day shift and came to the plant every day; Rodriguez did not hire employees; and while at various times Rodriguez, as an experienced employee, provided assistance to other less experienced employees, he did not make work assignments or settle grievances. These findings are not greatly at odds with those in the representation case.

Specifically, with respect to Esposito's presence in the plant, the Administrative Law Judge conceded that the subject was not directly addressed. Instead, the Administrative Law Judge concluded that Esposito was present more than 2 days a week because Esposito testified he had seen Rodriguez talking to employees Diaz and Gomez as many as 9 times a day, every day. However, it should be noted that Esposito also testified that he could not testify how many days he had seen these conversations occur. This testimony therefore lacks sufficient clarity to override the direct testimony in the representation case that Esposito was at the plant only 2 days a week. Further, the Administrative Law Judge found, as did the Board, that Esposito spoke no English. Therefore the Board's finding remains uncontroverted that due to this deficiency the day-to-day management of the plant is necessarily handled at least in part by Rodriguez. Concerning the determination that Rodriguez did no hiring, the Administrative Law Judge noted that Rodriguez specifically denied hiring anyone and that Respondent failed to produce rank-to-file witnesses to testify otherwise. He also noted that Rodriguez admitted advising an employee of an opening but that the record was not clear as to who hired him.

We believe that the fuller record in the representation case is a more reliable basis for deciding the question of Rodriguez' authority to hire. Indeed, Rodriguez' testimony in this case supports, in part, the finding in the representation case that he did hire at least one employee. Thus, the Administrative Law Judge noted that Rodriguez admitted writing a letter advising one individual of an opening, that the individual was hired, but the record was not clear as to who hired him. In addition, the Administrative Law Judge found, as did the Board in the representation case, that Rodriguez regularly assisted Esposito in interviewing applicants for employment because Esposito did not speak Spanish. In these circumstances, we adhere to our findings in the representation case proceeding that Rodriguez effectively directed the activities of the day-

shift employees; that his recommendations were highly influential in Respondent's choice of job applicants; and that in one case, he hired an employee on his own initiative. Accordingly, we reaffirm our conclusion in that case that Rodriguez was a supervisor.

Since a supervisor is not protected under the Act from discipline for engaging in unit or concerted activity,[4] the issuing of the final written warning letter to Rodriguez is not a violation of Section 8(a)(3), albeit similar letters issued to Diaz and Gomez did violate this section of the Act.

Relying on Board Decisions such as *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980), the Administrative Law Judge alternatively found that, even if Rodriguez were a supervisor, Respondent's warning to him was part of an integral pattern of conduct designed to interfere with the employees' Section 7 rights in violation of Section 8(a)(1) of the Act. In its recent decision in *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), the Board disavowed the "integral pattern of conduct rationale" as the basis for finding a violation of Section 8(a)(1). Applying the rationale of that case, we find that Respondent's warning letter to Rodriguez did not violate Section 8(a)(1) of the Act.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 7:

"7. By issuing final written warnings to employees Ana Diaz and Isdoria Gomez, in order to prevent them from participating in union activities or suspected union activities, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Gurabo Lace Mills, Inc., Gurabo, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,[5] as so modified:

1. Add the following as paragraph 1(h):

"(h) In any like or related manner interfering with, restraining, or coercing its employees in activities on behalf of a labor organization protected by Section 7 of the Act."

2. Substitute the following for paragraph 2(d):

"(d) Remove from the personnel files of Ana Diaz and Isdoria Gomez the warning notices issued to them on September 18, 1979."

3. Substitute the attached notice for that of the Administrative Law Judge.

[4] See, e.g., *Stop and Go Foods, Inc.*, 246 NLRB 1076 (1979); *L & S Enterprises, Inc.*, 245 NLRB 1123 (1979).

[5] In his recommended Order the Administrative Law Judge inadvertently neglected to order Respondent to cease and desist from violating the Act "in any other manner" although this broad cease-and-desist language was included in his notice. The Board held in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), that this broad language is warranted only in cases where "a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Considering Respondent's unfair labor practices in light of this standard, we conclude that a broad order is not appropriate in this case. Accordingly, we shall order Respondent to cease and desist from violating the Act in "any like or related manner."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

In recognition of these rights we hereby notify our employees that:

WE WILL NOT threaten employees with discharge for voting for Union General De Trabajadores de Puerto Rico.

WE WILL NOT create the impression that union activities of employees are under surveillance.

WE WILL NOT warn or direct employees to refrain from giving assistance and support to the Union or threaten said employees with discharge for so doing.

WE WILL NOT lay off employees because of their union activities.

WE WILL NOT reduce hours of employment of employees because of their union activities.

WE WILL NOT transfer employees to less desirable shifts because of their union activities.

WE WILL NOT issue final written warnings to employees in order to prevent employees from participating in union activities or suspected union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL NOT discourage membership in Union General De Trabajadores de Puerto Rico or any other labor organization by discriminatorily discharging any of our employees or discriminating in any other manner with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL offer to Jesus Paniagua immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of pay he may have suffered as a result of his layoff.

WE WILL restore to Jesus Paniagua the hours of employment normally made available to him prior to his discriminatory layoff and make him whole for any loss of pay he may have suffered as a result of the reduction in his hours following his reinstatement.

WE WILL transfer Miguel Hernandez to the first (day) shift.

WE WILL remove from the personnel files of Ana Diaz and Isdoria Gomez the warning notices issued to them on September 18, 1979.

All our employees are free to become or remain, or refrain from becoming or remaining, members of a labor organization.

GURABO LACE MILLS, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge: This case was heard before me on May 5, 6, and 7, 1980, at Hato Rey, Puerto Rico. The charge was filed on September 25, 1979,[1] by Union General de Trabajadores de Puerto Rico,[2] herein called the Union. The complaint issued November 16, alleging that Gurabo Lace Mills, Inc., herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. More particularly, the complaint alleges that Respondent violated Section 8(a)(1) and (3) by suspending employee Jesus Paniagua and reinstating him with less employment than he had previously received and would normally have received; transferring employee Miguel Hernandez to a less desirable work shift than he previously had been assigned to; and issuing final written disciplinary warnings to Ana Diaz, Isdoria Gomez, and Octavio Rodriguez because said employees joined and assisted the Union, and engaged in other concerted activity for the purpose of collective bargaining and mutual aid and protection. The complaint further alleges that Respondent independently violated Section 8(a)(1) of the Act by interrogating an employee concerning said employee's membership in, activities on behalf of, and sympathy for the Union; impliedly threatening the same employee with discharge of employees who voted for the Union in a Board-conducted election; creating the impression[3] upon the same employee that employee union activities were under surveillance by Respondent; and warning and directing an employee to refrain from giving assistance or support to the Union and threatening said employee with discharge and other reprisals if he continued to give assistance and support to the Union.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. Respondent filed a brief. Upon the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the General Counsel's oral argument and Respondent's brief, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation, is engaged in the manufacture of knitted lace products in the city of Gurabo, Commonwealth of Puerto Rico. During the year inmediately preceding issuance of the complaint, Respondent, in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business in Gurabo, Puerto Rico, goods and materials valued in excess of $50,000. Of these goods and materials, in excess of $50,000 worth were transported and delivered to Gurabo, Puerto Rico, directly from points located outside of Puerto Rico. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

Facts

In May 1979 Respondent's plant became the object of an organizing campaign. At that time, Octavio Rodri-

[1] All dates are in 1979 unless otherwise indicated.

[2] The name of the Union appears as corrected at the hearing.

[3] A second similar allegation was withdrawn at the hearing.

guez, one of Respondent's employees,[4] contacted Juan Eliza Colon, an organizer for the Union, and obtained from him union representation cards to be distributed among the employees. He, himself, distributed some of these cards among the employees on the first shift, talked to them about the Union, then talked to and gave additional cards to Jesus Paniagua, a second-shift employee, for further distribution among other second-shift employees. Subsequently, Rodriguez collected the signed cards from those employees to whom he had distributed them.

One of the day-shift employees who signed a union authorization card given to him by Rodriguez was Miguel Hernandez. He, like the others, returned the signed card to Rodriguez. Paniagua gave authorization cards to two of his night-shift coworkers[5] who filled them out, signed them, and returned them to Paniagua. Paniagua eventually returned these cards to Rodriguez. Paniagua also signed a card himself and returned it to Rodriguez.

On June 1 the Union filed a petition with the Regional Office of the Board to represent Respondent's employees.[6] On June 7 a notice of hearing issued and a hearing was conducted on June 11. At this hearing, the subject of supervision, and therefore eligibility to vote, was discussed. Gerald Scher, Respondent's president, Joseph Esposito, Respondent's plant manager, and Octavio Rodriguez testified at the hearing. At the end of the hearing it was agreed that everyone employed at Respondent's plant could vote except Esposito. The Decision and Direction of Election issued on June 20 and the election was scheduled for July 17.

Some time in June, according to Miguel Hernandez, while the two were standing at the entrance to the plant discussing other matters, Esposito interrupted the conversation to ask Hernandez' opinion of the Union.[7] When Hernandez replied that he did not know much about it and had nothing to say to him, the subject was dropped.

During the second week in July, about a week before the election, Hernandez was at his machine when Esposito once again brought up the subject of the Union. He told Hernandez that the boss had a list of names of the people who were going to vote for the Union and that when the election was over these people would be suspended or laid off.[8]

On July 17 the election took place in accordance with the Decision and Direction of Election. Rodriguez was the observer on behalf of the Union and employee Ramon Montanez was the observer on behalf of Respondent. Rodriguez' vote was challenged on grounds that he was a supervisor. The tally of ballots showed that of 14 ballots cast, 7 were in favor of Petitioner, 6 were cast against the Union and Rodriguez' vote, being challenged, could be determinative.

The day after the election, July 18, when Jesus Paniagua, the employee who had distributed union cards among night-shift employees, arrived at the plant to begin work, Esposito told him, "You don't have anymore work. You're laid off. Go collect."[9] Paniagua requested "a paper to take to unemployment" but Esposito refused to give him such a paper and told him to have the unemployment office call the factory.[10] Paniagua then requested that when he picked up his check on Thursday, payday, for the previous week, that Respondent have the extra 2 days' pay (for July 16 and 17) there for him to pick up as well, so that he need not have to make a special trip to the plant for the purpose of picking up the additional money owed to him. Esposito refused this convenience and told Paniagua that he would have to wait until the following week to pick up the extra 2 days' pay. Paniagua pointedly advised Esposito that for him, Paniagua, not to get angry, Esposito should have the check ready, in safekeeping, when he arrived. That Thursday, when Paniagua arrived to pick up his check, Esposito had 2 days' additional wages for him to pick up in cash.

Respondent admits that, on the date after the election, it laid off Jesus Paniagua. Esposito testified that, at that time, he told Paniagua he was being laid off because Leonard Edelson, part owner and officer in the Company, had called him and told him to shut down some of the production machines, Paniagua's machines in particular,[11] because they were not needed at the moment. The call was received, according to Esposito, on July 17. He further testified that, since Paniagua was the last employee hired, he would have to be the first one laid off under the circumstances. Esposito testified that he told this to Paniagua and further informed him that, when he needed him, he would call him.

Edelson testified that he had "advised Gurabo to stop six machines because we were slowing down and I did not want a lot of additional inventory this year with the talk of recession, inflation and shortages of yarn."

Edelson testified further that in the past the Company would close goods out when it was slow but he decided to change this policy. Respondent had a reduction, according to Edelson, of approximately one-third when it laid off Paniagua from the second shift. Edelson stated

[4] This individual was found by the Board to have been, at the time of the organizing campaign, a supervisor within the meaning of the National Labor Relations Act. *Gurabo Lace Mills, Inc.*, 249 NLRB 658 (1980). On the facts before me, discussed *infra*, I shall find otherwise.

[5] Gamaliel Diaz Hernandez and Francisco Solivan Sanchez.

[6] Case 24–RC–6328.

[7] This incident which, as noted above, occurred in June was not alleged in the complaint as a violation. Interrogation is alleged to have occurred during the second week of July (para. 5(a)). The record, however, reveals no evidence of interrogation in July. If the June incident is meant to be the basis for allegation 5(a), I find that it is not sufficient for me to conclude that Respondent coercively interrogated its employee in violation of the Act. *Genova Express Lines, Inc., and Genova Transport, Inc.*, 245 NLRB 229 (1979).

[8] As noted earlier, Esposito denied talking to any employees concerning their union activities or sympathies. Hernandez is credited.

[9] According to Paniagua, no reason was given to him by Esposito for his layoff. Esposito admitted during the hearing that he had told a Board agent that he had not been present when Paniagua was laid off but that the reason for the layoff was that business was slow. I credit Paniagua's description of the layoff incident.

[10] Esposito testified that Respondent never gives such letters; that the practice is for the employees to go to the Labor Department, apparently to file a claim, and for the Labor Department to contact the Respondent concerning the matter. Nevertheless, Esposito testified, in this case he gave Paniagua the requested letter at a later time.

[11] Through testimony adduced later through Esposito, it becamen clear the the six machines which were shut down included some which had and others which had not been assigned to Paniagua. Edelson testified that he ordered six machines shut down, not necessarily Paniagua's.

that Paniagua was the individual chosen for layoff because he had been the last person hired. Edelson volunteered that Respondent laid off Paniagua at the time it did, right after the election, because he did not want to do it prior to the election since he was concerned that it might be considered illegal or might "taint the election."

On July 20 Respondent filed Objections to Conduct Affecting the Results of the Representation Election. The Region subsequently investigated both the objections and the challenged ballot and thereafter, on September 13, issued and served upon the parties a Supplemental Decision, Order, and Notice of Hearing in which he dismissed three of Respondent's four objections and reserved ruling on the remaining objection pending a final determination of Rodriguez' status by the Board. This issue, which had been raised by means of Respondent's challenge to Rodrirquez' ballot, was ordered to be resolved through a hearing scheduled for October 18.

On September 15,[12] 2 days after the Supplemental Decision, Order, and Notice of Hearing issued and was served on the parties advising them that the question of Rodriguez' supervisory status would be the subject of a hearing, the following warning was issued to Rodriguez:

FINAL WRITTEN WARNING

TO: OCTAVIO RODRIGUEZ

It has come to my attention that during working time you have been leaving the knitting department almost daily and going over to the area of the mill where Ana Diaz and Isdoria Gomez work. When you go over there you have been engaging in social conversation with these two girls and as such they have not been performing their work *so that they can be responsive to you.*[13]

This is the first time that this matter has come to my attention in view of my recent absence from the plant. However, I want to inform you that *as supervisor*[14] your main duty is to be present at all working times in the knitting department and to perform your basic duties there. Your continued and daily absences from this area, which have occurred almost daily for the past two months, must cease immediately.

If you refuse to perform your job properly I will have no other choice but to discharge you.

The warning was signed by Joseph Esposito and witnessed by Ramon Montanez.[15]

On the same date, the following identical warnings were sent to employees Ana Diaz and Isdoria Gomez:

FINAL WRITTEN WARNING

I have been informed that you have been failing to do your work during working hours, almost daily, for the last two months[16] by devoting yourself to conversing with your supervisor Octavio Rodriguez.

I wish to inform you that this conduct and neglect of your work fcr the sake of conversation is not acceptable in our company, so that if you continue to refuse to complete your work in good order, I will have no alternative but to discharge you.

On September 18, 1979, Esposito approached Rodriguez while he was working at his machine and told him that Gerald Scher, Respondent's president, wished to see him in his office. Esposito accompanied Rodriguez to Scher's office where Scher presented Rodriguez with a letter[17] which he asked Rodriguez to sign. The letter stated that Rodriguez was a supervisor for Gurabo Lace Mills and that he had been taking employees Ana Diaz and Isdoria Gomez out of the plant to talk with them during working hours.[18] After reading the letter Rodriguez looked at Esposito and asked him if he were responsible for telling Scher what he considered to be a lie. Esposito then explaibed to Scher that it was inside the plant that Rodriguez had been talking to Diaz and Gomez, not outside. After Esposito made this oral correction and after Rodriguez refused to sign the warning letter, he was sent back to his machines to continue working. After working for about 5 minutes, Esposito came out and again told Rodriguez that Scher wanted to speak to him. For a second time Esposito accompanied Rodriguez to Scher's office. This time Scher talked to Rodriguez about a case which the latter had pending with the Commonwealth of Puerto Rico Labor Department and which Scher acknowledged involved his owing a lot of money to the workers. He then informed Rodriguez that he had come to San Juan to visit the Labor Department's office where he had proved to them that he "didn't owe one single cent to the workers." Rodriguez responded that, if this were the case, Scher should be happy. Scher, then returning to the original subject,

[12] Though the warning was dated September 15, it was not actually delivered to Rodriguez until 3 days later. The September 15 date is important, however, because it shows the timing relationship between the receipt of the Supplemental Decision and the decision to issue the warnings.

[13] Emphasis supplied.

[14] *Ibid.*

[15] Ramon Montanez served as Respondent's observer at the representation election and challenged Rodriguez' ballot on grounds that he was a supervisor, allegedly at the instruction of Respondent's attorney. It is interesting to note that following the October hearing, Montanez was rewarded by being given Rodriguez' job. This switch of jobs between Rodriguez and Montanez was not, however, alleged in the complaint as a violation, nor was it litigated.

[16] It had been 2 months since the election.

[17] Rodriguez testified that the letter shown to him by Scher on September 18 was not exactly the same as the one directly quoted above. The implication is that it was similar. Both Edelson and Esposito testified that the three warning notices described herein were the only disciplinary letters ever issued to any employees by Respondent. Esposito testified that though the three warnings were given to Rodriguez, Diaz, and Gomez, since the three refused to sign them, Respondent kept them. They had, according to Esposito, been prepared by Scher and either mailed or handed to him. His testimony was confused.

[18] Leonard Edelson testified that there is no such thing as a set of written plant rules and nothing in writing concerning a prohibition against employees talking to each other. Esposito, on the other hand, testified initially that there was in fact a set of written plant rules in existence. When counsel for the General Gounsel pointed out that the same had been subpoenaed, Esposito then denied their existence. Still later he again acknowledged their existence, then again denied it.

told Rodriguez that, if Esposito caught him talking to the employees, he was authorized by Scher to fire him immediately. Rodriguez was then again sent back to work.[19]

Diaz and Gomez were called in to be given their warnings probably on the same day that Rodriguez was given his. Ramon Montanez was retained as a witness by Esposito during these disciplinary interviews.

Along with the above-described disciplinary letters there were placed in the personnel files, attached to the warning letters addressed to Diaz and Gomez, disciplinary forms both signed by Esposito. On these forms it was stated that the two employees had been warned orally on four occasions, presumably about stopping work in order to engage in conversations. However, when Esposito was asked if he had ever spoken to any of the three about this subject prior to the issuance of the letters, he denied it. These disciplinary forms had never been used at Gurabo Lace Mills before. Esposito testified with some doubt that the forms came from Westchester Mills in New Jersey. However, the forms bear the letterhead of Gurabo Lace Mills, Inc., and are written in the original in Spanish. I conclude that these forms were produced by Respondent for the special and particular purpose of covering the incident herein discussed. Esposito signed the forms despite the fact that they are in Spanish and he neither speaks nor reads Spanish.[20]

Miguel Hernandez, an employee of Respondent, was hired to work on the night shift in 1976. He worked on the night shift for about a year and a half, at which time he was transferred to the day shift. When transferred to the day shift Hernandez was informed that it might be for just 2 weeks or it might be permanently. In reality, Hernandez was switched to day shift for Ramon Montanez, a day-shift worker who was transferred to the night shift to take Hernandez' place because of some difficulty he had been having with another employee on the day shift. Both Hernandez and Montanez had been working on the warping machine.

On September 18, the same day that Rodriguez, Diaz, and Gomez received their warnings, Scher called Hernandez into his office at 2:55 p.m. and told him that as of the following day he was being transferred back to the night shift. The ostensible reason for the transfer as explained by Scher was that he had checked the cards and found that Gamaliel[21] Diaz had been with the Company longer than Hernandez had been. Hernandez advised Scher that he did not know whether he could work nights but would let him know the following day. The following day Hernandez agreed that he would work nights, there being no apparent alternative. As of September 24 Hernandez was involuntarily placed on the night shift, Diaz was placed on the day shift, and the following day the charge was filed by the Union alleging violations concerning the treatment of Hernandez.

Esposito testified that Diaz was transferred to the day shift on September 24 and that the decision to make that change was made by both Scher[22] and himself, jointly. Esposito stated that Diaz was transferred to the day shift and Hernandez to the night shift because the former had more experience, particularly on the warping machine, and could, in fact, run two warping machines simultaneously, whereas Hernandez could run only one warping machine at a time. Esposito argued that the running of two warping machines simultaneously was advantageous because it was thus made possible to keep all of the knitters busy and thereby increase production.

Meanwhile, on September 14, Scher advised Paniagua by certified letter that he should report to work September 21 "to receive pertinent instructions." The letter also contained a caveat that, if he failed to report as instructed, he would be replaced. When Paniagua reported for work, he went in to see Esposito and showed him Scher's letter. Esposito, however, told Paniagua that he did not know that Scher had called him back to work, and that Paniagua should return the following Monday, after Esposito had a chance to talk with Scher. On Monday, September 24, Paniagua again reported to Esposito who told him that henceforth he would be working a 35-hour week, 5 days per week, with an hour off for lunch.[23] Prior to his layoff, Paniagua had usually worked in excess of 70 hours per week, and, when he returned, true to Esposito's word, he worked the limited number of hours promised, at least for the first several weeks. Meanwhile, the other employees,[24] during the period immediately following Paniagua's reinstatement, continued to work, on the average, over 70 hours per week.

On October 18, 19, 22, and 23 the hearing was held before the National Labor Relations Board to determine the very important question of Rodriguez' supervisory status. Since Rodriguez had been the primary organizer for the Union, the outcome of the election might well be determined by the answer to this question. On December 17 the Hearing Officers' Report and Recommendations on Challenged Ballot issued. In it the hearing officer found that Rodriguez performed leadman functions and

[19] The description of this incident appears as credibly described by Rodriguez in his testimony.

Esposito testified concerning this matter that in September he had in fact spoken to Scher about observing Rodriguez speaking to employees. He could not recall, however, whether this discussion with Scher was in person or over the telephone. Esposito testified that, when he saw Rodrigues speaking to other employees, it was outside the knitting room and that these employees would stop working in order to listen. Despite his apparent displeasure with this alleged activity, however, Esposito admitted that he said nothing to Rodriguez or the other employees about this matter. Nor did Esposito go over to where the conversation was supposedly taking place in order to find out what was going on, although he admittedly did not know what they were talking about. Esposito conceded that the discussion may even have been about work-related matters.

[20] Esposito's testimony that the forms were sent from Westchester together with the numerous contradictions in his testimony convince me that his testimony was largely adduced to support Respondent's position with little regard for the truth of the matter. Edelson acted as attorney and frequently led Esposito through his story, backing him up and rerouting his statements in order to correspond to Edelson's preferences. I find Esposito's testimony to be totally lacking in candor and sincerity and credit all testimony rather than his, where contradictions exist.

[21] Also appearing in the transcript as Galmial Diaz.

[22] Scher, who at the time of the hearing had just recently been discharged from the hospital, did not testify. Nor did Respondent accept the offer of a continuance so that he might do so.

[23] Other employees received one-half hour for lunch. Paniagua worked the 35-hour week until December sometime, at which time he was once again permitted to work his regular number of hours.

[24] Female employees always worked 35 to 40 hours.

did not possess supervisory authority. He recommended that the challenge to the ballot of Rodriguez be overruled. On May 20, 1980, however, the Board reversed the hearing officer and determined that Rodriguez was at all relevant times a supervisor.[25]

Analysis

Paragraph 5(a) which alleges unlawful interrogation has been dealt with in an earlier section of this Decision. I find no merit to this allegation.

Paragraph 5(b) alleges that during the second week of July Esposito impliedly threatened an employee with the discharge of those employees of Respondent who voted for the Union in the forthcoming election. As noted earlier, employee Hernandez was told by the plant manager that the boss had a list of names of the people who were going to vote for the Union and that when the election was over these people would be suspended or laid off. I find the statement patently in violation of Section 8(a)(1).

Paragraph 5(c) alleges that during the conversation described above Respondent created an impression that union activities were under surveillance by Respondent. I find that Esposito's statement would certainly have that kind of effect on Hernandez. The General Counsel has proved the violation.

Paragraphs 6(a) and (f) allege that employee Jesus Paniagua was suspended because of his union activity. As noted in the previous section, Paniagua received from Rodriguez a number of union cards to distribute among night-shift employees. Besides signing a card himself, Paniagua gave cards to two other employees on the night shift, got them signed also, and returned the three signed authorization cards to Rodriguez. There is no question that Paniagua was the most active union activist at the plant with the single exception of Rodriguez.

Company knowledge of Paniagua's organizing on behalf of the Union may justly be inferred on the basis of the small plant theory,[26] there being just 14 employees employed at the plant, only 5 on the night shift on which he worked. More importantly, however, Esposito himself acknowledged to Hernandez that "the boss had a list of names of the people who were going to vote for the Union and that when the election was over these people would be suspended or laid off." Finally, and most importantly, Esposito admitted on the stand that Gamaliel Diaz had told him prior to the election that Paniagua had forged his, Diaz', signature to a union authorization card, thus specifically implicating Paniagua in the organizational campaign and advising Respondent directly of his role in it.

In light of Paniagua's known union activity and the threat of management to suspend or lay off union adherents immediately after the election, the timing of Paniagua's layoff the very next day after the election provides conclusive evidence that management's threat was, indeed, being carried out.[27]

Although I consider the evidence conclusive that Paniagua was terminated for discriminatory reasons clearly violative of the Act, it is still worthwhile, for purposes of review, to examine Respondent's contention that it had legitimate nonviolative reasons for terminating Paniagua at the time it did. Respondent's records, it would seem, tend to support its contention that Panaigua's layoff might have been the result of economic factors, for those records indicated that, at the time of Paniagua's separation, during that quarter, the total number of hours worked was less then during the same quarter of the previous year and, indeed, less than the number workerd during the previous quarter of 1979. Thus, it would appear, at first glance, that there were, in fact, fewer hours of work available for Respondent's employees at the time Paniagua was terminated than during comparable earlier periods of time.

However, the record indicates that Gurabo Lace Mills has only one customer, Westchester Lace, its parent company located in New Jersey. Westchester determines which of its own orders will be filed by Gurabo, which by its own New Jersey mill, and which will be subcontracted to other companies. Similarly, Leonard Edelson who currently owns 42 percent[28] of Gurabo and is an officer of the Company, by telephone or letter from New Jersey controls production at Gurabo, instructing the plant manager at Gurabo Mills what type of production Westchester requires, what changes in the machines must be made to meet these requirements, and which machines to shut down in order to slow production. What all of this means is that whereas an independent company's production is dependent on orders from independent customers and is subject, to a large degree, to the vicissitudes of the market place, Gurabo is more like an adjunct or appendage[29] to Westchester whose officers can manipulate its production for whatever purpose they may have at the time. Thus, the drop in production at Gurabo may or may nor have a direct relationship to the number of orders which Westchester must fill for its customers. In short, I find that in the absence of any records from Westchester showing a drop in orders for the type of goods manufactured at Gurabo, the drop in production at the latter plant does not conclusively indicate that Paniagua's layoff was necessitated by legitimate economic considerations. Indeed, it is equally valid to assume

[25] 249 NLRB 658.

[26] *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959); *Don Swart Trucking Co., Inc.*, 154 NLRB 1345 (1965), affd. 359 F.2d 428 (4th Cir. 1966).

[27] In light of Esposito's threat, Edelson's explanation that Paniagua was laid off right after the election because to do so before the election might be illegal or might taint the election is rejected.

[28] Though Edelson did not become a 42-percent owner until October 1979, the record is clear that during the entire relevant period his authority was as described herein. The other part owner of Gurabo Lace Mills is Gerald Scher. Edelson and Scher are also the owners of Westchester Lace as well as its managers.

[29] Indeed, Edelson testified that Westchester Lace has 32 knitting machines. Gurabo has 18 machines significantly numbered 33 through 50. This sequential numbering system, the transfer of personnel, management, and rank-and-file from Westchester to Gurabo, the fact that virtually all operations at Gurabo are directed from New Jersey, and that all records are kept in New Jersey convince me that Gurabo is operated solely as an addition to Westchester and is totally subservient to the production requirements of Westchester. Sales records were subpoenaed but were not produced. An adverse inference is taken.

that the drop in production was the direct result of his layoff rather than the other way around, and that factors other than production should therefore be given more weight in determining the reasons for Paniagua's layoff.

Among the factors to be given consideration in determining the true reason for Paniagua's layoff are, as noted above, the fact that he was a union adherent, that management had threatened to fire union adherents after the election was over, and that, true to Esposito's word, Paniagua was terminated immediately after the election. Thus, the timing of the discharge, occurring when it did, is an important factor in determining the real reason for his discharge.

Another factor to be considered is the way that the exit interview was conducted. Thus, Paniagua testified credibly that on July 18, the day after the election, he reported to work as usual and was abruptly told, "You don't have any work. You're laid off. Go collect." It seems to me that if management bore Paniagua no animosity and his layoff was strictly a matter of economic necessity, Esposito would have injected into his notice of layoff some note of sympathy instead of coldly telling him, "Go collect!" Similarly, a strictly unavoidable layoff of a faithful employee would have dictated some advance notice to afford him time to seek out other employment. Finally, even in the absence of advance notice of the layoff, it would seem that if management bore Paniagua no ill will it would have permitted him to complete the workweek through Saturday, rather than suddenly suspend him on a Wednesday, in the middle of the week, without permitting him to even finish out the day, though he had already reported to work and was ready to perform his duties. Esposito's initial refusal to provide Paniagua with a written layoff notice to give to the unemployment office and his denial of Paniagua's legitimate request that his next paycheck include the 2 days he had just worked that week smacks rather of a vindictiveness consonant with animosity probably borne of management's displeasure with Paniagua's union activity. A purely economic layoff would more likely be attended by a more altruistic attitude toward such a request.

Another factor to be considered in determining the true reason for Paniagua's sudden suspension is the fact that no one had ever been laid off by Respondent before. Esposito testified that in the 7 years that the Company had been operating no one had ever been laid off before.[30] Rather than lay off an employee, Esposito explained, the Company would reduce the total hours worked by employees when production was slow, then increase the number of hours when Respondent again became busy. Paniagua's was the very first instance where, instead of reducing the total number of hours worked by all employees, an employee was laid off.[31] This was a total break with past practice. In the past, Respondent also took the option of slowing the machines or transferring employees from one job to another,[32] rather than lay off an employee when less production was required. Again, Respondent chose not to do this on July 18 and, instead, for the first time, opted to lay off Paniagua.

Esposito testified that, after Paniagua was laid off on July 18, the other employees continued to work their regular number of hours. The payroll records of Respondent indicate that during the 10 weeks following Paniagua's layoff, the other knitters worked in excess of 70 hours per week most weeks. This included, of course, a great deal of overtime. Clearly, if Respondent were so disposed, it could have shared the work among all the knitters and kept Paniagua working just as it had done in the past. Its sudden change from past practice at the expense of Paniagua evidences a violative motivation, particularly in light of the fact that Paniagua, himself, worked several hours of overtime the day before his layoff ostensibly because of a lack of work.

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[30] Esposito made this statement while under direct examination by counsel for the General Counsel. On cross-examination by Edelson, the following testimony was adduced:

> Q. Okay. Joe, you spoke about not laying off in the past according to seniority. That's what you told Mrs. Belaval, is that correct?
> A. Right.
> Q. Okay. Can you recall any incident where we ever laid anyone off before Paniagua?
> A. In the plant?
> Q. Yes.
> A. No.

This clearly was not the answer that Edelson wished to have in the record, so:

> Q. We never laid off a girl or anyone else?
> A. O, Yeh. We laid off Geraldine [sic].

Though Edelson apparently obtained the answer he desired by means of steering the witness to it, the Company's own records, its timecards, indicate that as of at least July 20, 2 days after Paniagua's layoff, Jeraldin Rodriguez was still employed. Clearly, Esposito sang the song orchestrated by Edelson's examination.

Though Esposito went on to state that Jeraldin Rodriguez was the youngest of the three female employees in seniority, her payroll records were not offered to substantiate Esposito's testimony.

[31] Esposito's testimony appears here as testified to while undergoing direct examination by counsel for the General Counsel. Later, when undergoing cross-examination by Edelson, who acted as representative of Respondent, Esposito hedged on this point, frequently contradicted himself, reversed his field, and generally discredited himself. I find his initial testimony far more credible than his later attempt to change his statement under the guiding influence of Edelson, e.g.:

> A. What I meant is that when we slow down, which has never happened, we slow down the production.
> Q. But you said that—you just now said we never work less than ten hours, so how could we be slow?
> A. Well so far we've never been slow.
> Q. We've never worked less than ten hours, is that what you are saying?
> A. Right.
> Q. But you said—again, I have to ask you this again, Joe. You made a statement, and you said the way we slowed down in the past is by cutting back the hours in the mill. Have we ever done that?
> A. No, that was a mistake.

[32] This testimony of Esposito also reflects that which was adduced under counsel for the General Counsel's direct examination. Later, under Edelson's cross-examination, the following testimony was elicited:

> Q. So have we ever taken a knitter off a machine when we slowed down and had him do other work around the place?
> A. Well its happened a lot of times.
> Q. Tell me one time when we stopped six machines and had a knitter do other things in the place.
> A. No not that. We never stopped a machine and put a knitter to do some other work.

Once again I credit Esposito's initial testimony adduced during counsel for the General Counsel's direct examination rather than his later testimony adduced by Edelson, on cross-examination by means of leading questions, argumentation, and changes in tone of voice and emphasis of syllable designed to elicit information clearly supportive of Respondent's position, and contrary to the witness' prior testimony.

Edelson testified with regard to the decision to lay off Paniagua that July is historically a slow month in the textile industry. He stated that, in previous years, Respondent continued production and accumulated inventories during the slow months but that this year it was decided, because of the "talk of recession, inflation and shortages of yarn," not to accumulate inventories. Rather, Respondent determined, for the first time in its history, to stop operation of six of its knitting machines. Esposito supported this much of Edelson's testimony by stating that the reason for Paniagua's layoff was that he had received orders from Edelson in New Jersey on July 17, the day of the election, to shut off Paniagua's machines[33] and lay him off.[34] The following day, according to Esposito, he did so.

When Esposito was asked what procedure was followed when one of the employees was absent, he stated that the other employees who were present would take care of the absent employee's machines. Similarly, when a particular machine broke down, the specific employee assigned to that machine simply watched one machine fewer than usual. Thus, it is clear from this testimony that the employee complement was fairly elastic in that each could and would work on each other's machines and there would have been no problem with dividing the remaining machines among all of the employees including Paniagua after the six machines were shut down on July 18. However, despite Esposito's initial testimony to the contrary, it was not Paniagua's machines that were shut down. As revealed by the company records, made available and discussed later in the hearing, usually only two of the six machines shut down between the weeks ending July 30 and September 24 had previously been assigned to Paniagua.[35] Thus, it is clear that Paniagua's suspension had nothing to do with the machines which he had been operating as initially intimated by Respondent. Later, in the hearing, Edelson attempted to emphasize that, which ever machines it was decided to shut down, it would still have been Paniagua who was laid off because Paniagua was the least senior employee. Despite Edelson's testimony, however, the fact remains that Esposito specifically testified that "seniority was never used at the company for layoffs or transfers or anything," so that the only certainty about the matter is the fact that Respondent's case is shot full of inconsistencies.

To sum up, relying on the above factors, I find the General Counsel's case far more credible than that of Respondent. I find that Paniagua was terminated because of his union activity not because of any legitimate economic reason, and that the fact that he was the most recently hired employee was used as a mere convenience to that end.

Paragraphs 6(b), (c), and (f) of the complaint allege that Paniagua was reinstated on September 24 but with less employment than he previously received and would have received but for his having engaged in union activities. This allegation is supported by the record, at the very least, to the extent that Paniagua did return to work on September 24 at reduced hours, namely, a 35-hour week, and that this was far fewer hours than he had worked prior to his suspension. The only question is whether the reduction in his working hours was discriminatorily or economically motivated.

According to Paniagua, when he returned to work, he was assigned to the same machines as he had worked on before his suspension. Though he was assigned to work only 35 hours per week, the other knitters worked on the average of 70 hours per week. When Esposito was asked why Paniagua was permitted to work only 35 hours when the other employees were permitted to work 70 hours, Esposito replied, "I don't know, they said to hire him for thirty-five hours and this is what I did." Esposito identified the individual who ordered him to rehire Paniagua for 35 hours per week as Gerald Scher. Scher was not called as a witness to explain this decision.[36] Inasmuch as I have found that the suspension or layoff of Paniagua was discriminatorily motivated and Respondent has offered no explanation as to why he was restricted to a 35-hour week upon his return while all other employees worked a normal workweek, I must conclude that the disparate treatment of Paniagua was similarly motivated. I find the assignment of a 35-hour workweek to Paniagua upon his return from the disciminatory layoff to have been in violation of Section 8(a)(1) and (3) of the Act.

Paragraph 6(e) and (f) of the complaint alleges that on September 13 and 18 Respondent issued final written disciplinary warnings to employees Ana Diaz, Isdoria Gomez, and Octavio Rodriguez because said employees engaged in union or protected concerted activity. With regard to this issue the General Counsel contends that the reasons submitted by Respondent for issuing the warnings are "transparent and reveal thereunder the animus of Respondent towards Octavio Rodriguez." In support of this contention the General Counsel argues that Rodriguez was the key union organizer, served as observer for the Union at the representation election of July 17, and that Rodriguez' vote was challenged by Respondent on the basis of his supervisory status. Thus, it follows, the General Counsel argues, that Respondent was aware of Rodriguez' prounion sympathies.

I find merit in the General Counsel's contention that Rodriguez was a prounion sympathizer and that Re-

[33] Each knitter was responsible for and assigned to between five and seven specific machines. According to Esposito, Paniagua had been assigned to watch machines numbers 40, 41, 42, 47, 48, and 49. Though, as noted above, Esposito initially testified that he was told by Edelson to shut off Paniagua's machines, he later changed his testimony to state that he never said that the machines he had been told to shut off were Paniagua's machines, only that they were machines that were not needed. This is still one more example of Esposito's inconsistent and contradictory testimony.

[34] According to the credited testimony of Paniagua, he worked overtime from 11 a.m., July 17, to 1 a.m., July 18. It is not at all clear why Esposito did not tell Paniagua on July 17 not to return to work the following day.

[35] There was some discrepancy between Esposito's testimony and that of Paniagua and Rodriguez as to precisely which machines had been assigned to Paniagua. I credit Paniagua on this point but in either case the finding is that only two of his machines were shut down following his suspension.

[36] Though Scher had, at the time of the hearing, just recently been released from the hospital, Respondent was advised that the hearing could be resumed after several weeks in order to permit Scher to testify, if Respondent wished to present evidence through him. Respondent declined the offer of a continuance.

spondent was well aware of it. I find knowledge on the part of Respondent based not only on the small plant theory and on the role Rodriguez played as observer for the Union at the election but also on the basis of Respondent's action following the closing of the polls. For at the closing of the polls, the ballots were counted revealing that of 14 ballots cast, 7 were in favor of the Union, 6 were against the Union, and 1, that of Rodriguez, was challenged. Thus, if Respondent had any doubt about Rodriguez' prounion sympathy it could have withdrawn its challenge with the hope that Rodriguez' ballot, when counted, would have been against the Union, thus defeating the organizing attempt there and then. That Respondent maintained its challenge to Rodriguez' vote, sacrificing a possible immediate victory at the polls convinces me that it was certain of Rodriguez' prounion sympathies.[37] By maintaining its position with regard to Rodriguez' supervisory status, Respondent hoped to defeat the Union by proving that the Union's campaign was tainted by Rodriguez' participation therein. The General Counsel argues that since Respondent knew that Rodriguez was a union adherent and since Esposito admitted talking to employees during working hours, the only objection to Rodriguez doing the same thing was that he was suspected of speaking to them about the Union. In further support of this theory the General Counsel correctly points out that there is no Company rule against one employee speaking with another, that Esposito never inquired of Rodriguez what he was talking to the other employees about, and that at no time did Esposito reprimand Rodriguez, Diaz, or Gomez for the actions which resulted in the issuance of the final written warnings.

Respondent's position on this issue is best stated by quoting it in its entirety, as it appears in its brief: "Warnings were given in writing for the first time, because the employees were now involved with a union." I take this statement of position to mean that but for the presence and organizing efforts of the Union, no written warnings would have issued. The institution of a written warning system as a response to a union organizing campaign is violative of the Act and the issuance of particular written warnings under the newly instituted program is likewise violative of Section 8(a)(1) and (3).[38]

But even without the admission by Respondent that the warnings were in response to the advent of the Union it is patently clear that the warnings were discriminatorily motivated rather than being issued for any legitimate business consideration. Thus, the content of the warning letter to Rodriguez complains about him going over to the area of the mill where Diaz and Gomez work. Yet in the warning letters to Diaz and Gomez Respondent complains about their talking to *their supervisor*, Octavio Rodriguez. If Rodriguez is, in fact, Diaz' and Gomez' supervisor, how is he expected to supervise them without going into their area? The criticism is absurd. Similarly, if it is Rodriguez' job to supervise the two named employees, how does he do so without conversing with them. To issue a written warning to an individual for talking to fellow employees when that person's duties require him to talk to said employees in order to perform his duties evidences discriminatory motivation.[39] In the instant case, if Respondent is to be believed, Rodriguez is Diaz' and Gomez' supervisor and, of necessity, must talk to them in order to supervise. To issue him a written warning for doing so is evidence of discriminatory motivation. Similarly, from the point of view of Diaz and Gomez the warning letters are equally absurd. Here, Respondent sends to the two rank-and-file employees identical letters in which the point is especially made that Rodriguez is their supervisor. Then, instead of going on to say that, since he is their supervisor, they should listen to him, pay attention, and follow his orders, the warning letters state that they should not talk to him. If Rodriguez is, in fact, their supervisor, their superior, what alternative do they have when he comes over to talk to them? Walk away? The internal inconsistencies of these warning letters, the illogicality of their issuance indicates a certain ulterior motive.

Moreover, the warning letter to Rodriguez complains about "social conversation" whereas Esposito, the plant manager who signed the letter, testified that he did not know what Rodriguez was talking to Diaz and Gomez about, that it might well have concerned work. Of course, he also admitted that he never bothered to ask any of the three what the subject of their conversation was about, and certainly there should have been some interest in the subject matter of these conversations if the discussions were serious enough to result in warning letters. Failure of Respondent to investigate before issuing the final warnings is evidence of discriminatory motivation.[40]

The warning letter to Rodriguez states that "this is the first time that this matter has come to my attention," and this may well be the case, for Esposito testified that his displeasure with Rodriguez' talking to Diaz and Gomez had never been brought to their attention before. That being the case, why then were all three warning letters titled "FINAL WRITTEN WARNING"? Such a caption would indicate that there were previous warnings and that this warning would be the last in a series before discharge. Yet, these three simultaneously issued warnings were not the last in a series but the first warning received by the individuals involved. That they were both the first and final warnings is somewhat inconsistent in itself. Granted that for an employer to issue a first and final warning is probably not unheard of in the industrial labor field, yet one would logically assume such a methodology would be used only in cases where the particular offense is extremely serious, for example stealing, fighting, drinking on the job, or similar taboos. Here, what were the employees doing for which they were given a "final warning" and threatened with discharge?

[37] This conviction is all but fully substantiated by Esposito's admission, while undergoing examination by the General Counsel, that he thought that he had heard "that Octavio had promised that they [the employees] would get more money and more holidays once the union won the election," and that he had "heard this in the place but that nobody came to me straight and said that."

[38] *Plastic Film Products Corp.*, 238 NLRB 135 (1978).

[39] *GTE Lenkurt, Incorporated*, 204 NLRB 921 (1973).

[40] *Sew Magic, Inc.*, 184 NLRB 924 (1970); *Everest & Jennings, Inc.*, 158 NLRB 1150 (1966).

Talking! Well, it is neither for me nor for the Board to declare that the punishment must fit the crime, but in such cases as here, where the disciplinary action taken is far out of proportion with the stated offense, the action taken evidences an ulterior motive.

Further, this set of warnings was not only the first received by the individuals involved but the first issued to any employee by Respondent in the entire history of its existence. This too has been held to be evidence of discriminatory motivation,[41] and I find it so here, especially in light of the fact that there was never any rule against employees talking among themselves[42] while working in existence at the time or before which might have been the subject of enforcement.

Finally, despite the complaint contained in all three warning letters that Rodriquez, Diaz, and Gomez were refusing "to complete their work in good order" or "to perform their job properly," Respondent offered absolutely no evidence that whatever talking was going on adversely affected production, and this has been held to be evidence that such warnings were pretextually inspired.[43]

If, in fact, Respondent had no legitimate basis for issuing the written warnings to Rodriguez, Diaz, and Gomez, why did it do so, and why at this particular time. Well, there is no doubt, as I have found, that Respondent was aware of Rodriguez' prounion sympathies. It is equally clear from Esposito's statement to Miguel Hernandez, to the effect that employees who voted for the union would be suspended, that Respondent was interested in keeping the union out and punishing employees who opposed its position. Therefore, since Respondent did not have the ready pretext of a lack of seniority to get rid of Rodriguez as it had and used to lay off Paniagua, it chose to issue a warning notice to Rodriguez to punish him for his union activities and to set him up for later discharge based on the newly instituted written warning system, the warning notices to be used as evidence in case of possible unfair labor practice charges. The warning notices to Diaz and Gomez served as a means of letting those individuals know that they would be putting their jobs on the line by fraternizing with Rodriguez, the primary union adherent.

I believe that the warnings were issued at the time they were because Respondent had just received notice on September 13, 2 days before the notices were written that there would be a hearing on objections to the election and on the challenge to Rodriguez' ballot to determine whether or not Rodriguez is a supervisor. Respondent was aware that if at the hearing Rodriguez was shown to be a supervisor, the results of the election might well be overturned.[44] It was therefore in the best interest of Respondent to keep the other employees away from Rodriguez both to keep him from soliciting their support in case of a rerun election as well as to keep him from possibly obtaining their agreement to testify in the forthcoming hearing on objections with respect to the supervisory issue.[45] Whether Respondent's motive was one, several, or all of the above reasons, it was clearly discriminatorily motivated, and I so find. The warnings to Diaz and Gomez were clearly violative of Section 8(a)(1) and (3) since they had the effect of discriminating against them with regard to the tenure of their employment and tended to discourage membership in and activities on behalf of the Union.[46]

The warning of Rodriguez was either violative of Section 8(a)(1) or of Section 8(a)(3) and (1) depending upon whether Rodriguez is considered to be a supervisor or an employee. For as I see it, the warnings to Diaz, Gomez, and Rodriguez were clearly intended to interfere with any communications between employees concerning their union activities, particularly with respect to the forthcoming hearing concerning Rodriguez' status as a supervisor or employee.[47] And if this was, in fact, the object of the warnings, then the three warnings reflected not a concern for Rodriguez' loyalty to management as a supervisor, but rather an action designed to interfere with *all* Section 7 activity of all employees, a pattern of conduct found unacceptable under the law and violative of the Act.[48]

But perhaps one need not reach this line of cases; i.e., that which deals with a discriminatory act perpetrated against a supervisor which is part of a pattern designed to undermine the Section 7 rights of the rank and file. Perhaps Rodriguez was not a supervisor but was, in fact, an employee under the Act. Though the hearing officer in Case 24–RC–6328 determined that Rodriguez was a rank-and-file employee of Respondent and the Board found him upon review to be a supervisor, the matter, in my view, may still be relitigated under the circumstances here involved,[49] and so it was.

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[41] *Tupco, Division of Dart Industries, Inc.*, 215 NLRB 424 (1974).

[42] *Ibid.; Ernest & Jennings, Inc., supra.*

[43] *GTE Lenkurt, Incorporated, supra.*

[44] See *Roper Corporation, Williamsburg Division*, 213 NLRB 136 (1974), for comparable factual situation where an employer's interest in keeping a union out depended upon proving supervisory involvement in the organizing campaign.

[45] According to the Hearing Officer's Report and Recommendations on Challenged Ballot, Respondent adduced testimony in support of its position from five unit employees and Petitioner from four employees including Rodriguez and Paniagua.

[46] *Sew Magic, Inc., supra; Everest & Jennings, Inc.*, 158 NLRB 1150 (1966); *Tupco, Division of Dart Industries, Inc., supra; GTE Lenkurt, Incorporated, supra.*

[47] The violation seems patently clear whether the discriminatory discipline is punishment for previously giving testimony in a National Labor Relations Board hearing such as in *Better Monkey Grip Company*, 115 NLRB 1170, enfd. 243 F.2d 836 (5th Cir. 1957), and *Fuqua Homes (Ohio), Inc.*, 211 NLRB 399 (1974), or is designed to interfere with the rights of individuals to participate in some future hearing.

[48] *Donelson Packing Company, Inc.*, 220 NLRB 1043 (1975); *Vada of Oklahoma, Inc.*, 216 NLRB 750 (1975); *Trustees of Boston University*, 224 NLRB 1385 (1976); *Illinois Fruit & Produce Corp.*, 226 NLRB 137 (1976); *J. D. Lundsford Plumbing*, 237 NLRB 128 (1978); *G and M Lath and Plaster Co., Inc.*; 252 NLRB 969; *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 969 (1980).

[49] *Serv-U-Stores, Inc.*, 234 NLRB 1143 (1978); *Robert E. Anderson and Richard E. Anderson, Co-partners d/b/a Anderson Cabinets*, 241 NLRB 513 (1979); *Amalgamated Clothing Workers of America, AFL–CIO* v. *N.L.R.B.* [*Sagamore Shirt Co.*], 365 F.2d 898 (D.C. Cir. 1966); *Fry Foods, Inc.*, 241 NLRB 76 (1979); *Capitol Foods, Inc. d/b/a Schulte's IGA Foodliner*, 241 NLRB 855 (1979); *Nevis Industries, Inc. d/b/a Fresno Townehouse*, 246 NLRB 1053 (1979). There is a distinction between the cited cases and the instant case but the general principle seems applicable.

During the hearing in the instant case[50] Rodriguez credibly testified as to his duties as an employee of Respondent. Rodriguez stated that he has been employed by Respondent since 1973. Previously he had worked for Respondent for 2 years at its Westchester Lace Company mill located in West New York, New Jersey. He was interviewed by Joseph Esposito and hired at Gurabo as a machine operator. His job was to watch six machines while they operated, to repair any broken threads, to balance beams and replace empty beams with full ones, and to cut the lace. These were the duties of a knitter. Rodriguez was initially hired to work on the second shift but later transferred to the day shift. At the time Rodriguez was first hired, not all of Respondent's machines had been set up and it employed only four employees in addition to Rodriguez and Esposito. Rodriguez credibly testified that the duties which he was initially assigned remained the same from the date of his hire right up until the date of the election, July 17, 1979.

Rodriguez testified that because of the nature of the work and the fact that everyone knew what to do, very few orders were necessary. These consisted mainly of instructions as to when styles should be changed and when lace should be cut. Esposito issued these orders.[51] When one of the knitters would fail to report for work, his machines were watched by the other knitters or by the mechanic until Esposito or later Santiago called someone in to replace the absent employee.[52] If, on Saturday, when Esposito were not present and Santiago had not yet arrived, a problem should arise, either Perez or Rodriguez would call Esposito who would decide what to do. If no particular problems arose, the employees performed their tasks without specific instructions since they all were aware of their duties.

Rodriguez specifically denied that he ever hired anyone[53] and Respondent failed to produce any rank-and-file witnesses to testify otherwise. Jesus Paniagua stated that when he transferred to Gurabo he reported to and received his instructions from Esposito just as he had before from Scher. He was told at the time by Esposito that if he were ever going to be absent, he should call in. On one occasion this occurred, Paniagua called in, spoke to Esposito, and the latter found a replacement for him. According to Paniagua, Sanchez is in charge of the night shift[54] and Esposito the day shift. Whenever Paniagua was called at home and told to report to work early, it was always Esposito who called him. Similarly, it was Esposito who told him and other employees to remain to work overtime when a second-shift employee had called in to say he was going to be late.

Rafael Morales testified that he was hired by Esposito. Rodriguez was present at the hiring but only to act as interpreter. Esposito[55] would ask Morales questions which Rodriguez would put into Spanish then, presumably, would translate Morales' answers from Spanish to English. Similarly, Esposito sometimes used Rodriguez as interpreter when communicating with other employees in the day-to-day operations at the plant.

Morales testified basically in accordance with Rodriguez and Paniagua. According to Morales, Esposito sees to it that all machines are operating correctly. When Esposito is absent, Santiago, the mechanic, is in charge. He answers the telephone and instructs the employees on how to correct any problems which might arise in Esposito's absence. Esposito assigns overtime to Morales when he works on the day shift and Santiago did so when he was on the night shift. He would also ask permission from these two to leave early. Morales was told when he was hired that if he were going to be absent or late he was to call in and advise Esposito.

According to Morales, Esposito collects the timecards and is responsible for computing the number of hours each employee has worked. In Esposito's absence, if a problem arises concerning the work, Morales goes to Santiago to solve it. Before Santiago transferred to the first shift, Morales would seek aid from Rodriguez in Esposito's absence because he was the oldest employee. Certain other employees would occasionally do likewise. Morales described Rodriguez' duties as the same as Perez', a knitter.

Miguel Hernandez testified that on the day shift he received his instructions from Esposito and on the night shift from Santiago. Esposito testified that the decisions re styles and production are dictated from New Jersey. He admitted in his testimony that he would instruct employees with regard to their work but added that the employees, particularly the female employees, might seek the help of one of the knitters, Rodriguez or someone else, to fix a machine. Thus, according to Esposito, if the quality of the goods is not satisfactory, the "girls" (quality control employees) go to Esposito or more often Rodriguez, presumably to fix or adjust the machine in order to improve the quality of those goods.

The only extended testimony on the supervisory status of Rodriguez adduced through Respondent's witnesses came from Leonard Edelson. Edelson testified in a self-

[50] The Hearing Officer's Report and Recommendations on Challenged Ballot, G.C. Exh. 16, and the Board's Decision at 249 NLRB 658 were considered. Inasmuch as both were based upon the hearing held on October 18, 19, 22, and 23, 1979, which I find to have been tainted by Respondent's unfair labor practices, I shall decide the supervisory status of Rodriguez, *de novo*. Any exception taken by Respondent based on my decision to determine Rodriguez' status *de novo* should be considered in light of the fact that my decision was made necessary by Respondent's own unfair labor practices designed specifically to undermine the hearing in Case 24-RC-6328. It should likewise be noted that Edelson, who acted as representative for Respondent in the instant case, was given numerous opportunities to call witnesses concerning the supervisory status of Rodriguez but refused to do so.

[51] Esposito also testified to this fact. When the female employees had problems with their work, according to Rodriguez, they would go to Esposito or Santiago for help. Only if Rodriguez happened to be in the vicinity changing beams would he answer their questions. When Esposito was in his office which was about 7 hours per day, he had Santiago take charge in the shop. Both Esposito and Santiago issued instructions to Rodriguez according to the latter.

[52] In the absence of both Esposito and Santiago, one of the knitters, Perez or Rodriguez, would make the call.

[53] Rodriguez admitted writing a letter advising one individual of an opening. That individual was eventually hired but the record is not clear as to who hired him. However, Montanez, another rank-and-file employee, contacted Morales to advise him of an opening. Morales was later hired by Esposito. Thus the letter proves nothing.

[54] If there are any problems on the night shift, Sanchez calls Esposito to advise him and obtain instructions.

[55] Esposito is an Italian and knows little Spanish.

serving conclusionary manner that Rodriguez is a supervisor on the day shift and sometimes on the night shift.

In particular, according to Edelson, Rodriguez, supervises Perez, a knitter, who watches seven machines. Company records indicate that Perez is paid $4.40 per hour while Rodriguez is paid only $4.10 per hour. The records also indicate that Santiago receives $4.45 and Sanchez $4.35 per hour, both more than Rodrigues. Edelson testified that despite the fact that Santiago's wages are higher than those of Rodriguez, Rodriguez is still Santiago's supervisor. He endeavored to explain this phenomenon by stating that Santiago is a mechanic. Mechanics, Edelson testified, are always paid more than supervisors.[56] Other knitters earn $3.80 and $4 per hour. I find Edelson's testimony with regard to the wage structure unpersuasive and that the fact that other rank-and-file employees are paid more than Rodriguez is supportive of the General Counsel's position that Rodriguez is a nonsupervisory employee.

Edelson testified that the shift foreman on the first shift, Rodriguez, is responsible for calling people in early when there is a lot of work and that Rodriguez is responsible for having people stay over when second-shift employees fail to show up, or when additional workers are needed. Edelson stated that he is also responsible for any problems that might arise when the plant supervisor, Esposito,[57] is not there and can use independent judgment in solving such problems.

I find Edelson's testimony concerning Rodriguez' day-to-day duties unreliable. Edelson admitted on the record that from the time the petition was filed to the date of the hearing, approximately 1 year, he had spent no more than 2 days at the plant and admitted further that he had not been present to visually observe the work being done. His testimony as to what Rodriguez actually does is therefore almost valueless. There are a large number of employees who could have been called to testify as to precisely what they have observed at the plant as far as Rodriguez' supervising is concerned. Respondent's representative was advised of his right to call such witnesses. He specically declined to do so. Similarly, he was advised of his right to question the General Counsel's witnesses through cross-examination if they had already testified on the subject and through direct examination if they had not. Respondent conducted very little cross-examination on the subject and declined to make any of the available witnesses his own in order to conduct initial direct examination of them to prove Rodriguez a supervisor. Inasmuch as the only credible testimony in the record is that of the General Counsel's witnesses, I find that there is no evidence that Rodriguez is or ever was a supervisor within the meaning of the Act during the period relevant to these proceedings.

One other matter is of some value in determining whether or not Rodriguez was a supervisor. The record indicates that Rodriguez about September 1977 filed a charge against Respondent with the Wage and Hour Division of the Commonwealth of Puerto Rico Labor Department on behalf of Respondent's employees. Leonard Edelson admitted on the record that Respondent's owner was "very upset" with Rodriguez filing the charge. Edelson also admitted that Respondent has been billed $26,000 by that agency, a sum which is due as backpay to its employees. It seems patently absurd for Respondent to continue to employ Rodriguez under these circumstances if, as Respondent contends, he is a supervisor and member of management. There would be no obligation for an employer to continue to employ an individual in management who deliberately undermines its well being by filing charges against the employer on behalf of its employees resulting in such a financial loss. But, if Rodriguez was a rank-and-file employee, his action would be protected. Thus, it is patently clear that Respondent knew full well that, when Rodriguez filed the charge with the Wage and Hour Division, he was a rank-and-file employee, was therefore protected and was for that reason kept on the payroll. The only reason that Respondent wants to have Rodriguez determined to be a supervisor at this point in time is to undermine the election campaign by relying on his participation therein to overturn the ultimate results of the campaign. I find that Rodriguez is a rank-and-file employee and that the warning which he received was, like the warnings to Gomez and Diaz, violative of Section 8(a)(1) and (3) of the Act.

Paragraphs 6(d) and (f) of the complaint allege that Respondent on September 18 transferred employee Miguel Hernandez to the night shift from the day shift because of his union activities. Respondent offers dual defenses to this allegation. First, it argues that Diaz was transferred to the day shift and Hernandez to the night shift because Diaz had more seniority than Hernandez. Secondly, Respondent argues that Diaz was transferred to the day shift and Hernandez to the night shift because Diaz was more experienced and was capable of working two warper machines simultaneously while Hernandez could not. I will consider these two reasons for Hernandez' transfer *seriatim.*

With regard to seniority, the record indicates that Diaz first obtained employment with Respondent in 1973. This was before either Rodriguez or Hernandez

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[56] Edelson stated that a skilled mechanic or knitter is more difficult to find than a foreman or supervisor. Therefore supply and demand warrants paying the former a higher wage than the latter.

[57] In 249 NLRB 658 the Board determined from a record not before me that Esposito is at the plant only 2 days a week. In the record in the instant case, the subject of how often Esposito is in the plant was not directly addressed. However, while Esposito was undergoing examination with regard to the reasons why Rodriguez, Gomez, and Diaz were given the warnings, the following testimony was adduced through him:

> Q. How many times did you see him speaking to the employees?
> A. Well lately, before we called it to his attention, it was about every hour or so.
> Q. Oh every hour?
> A. Every hour or two hours. I would say something like that.
> Q. Every day?
> A. *Every day.*
> Q. This is like nine times a day?
> A. It could be, yes.
> Q. For how many days, Mr. Esposito?
> A. I can't tell you how many days.

Thus Esposito claims, in effect, to have been present at the plant every day in order to witness Rodriguez allegedly talking to Diaz and Gomez. From this testimony and that of other witnesses, I find no basis in the instant case for concluding that Esposito is at the plant only twice a week. On the contrary, it would appear from this and the general testimony of all witnesses that Esposito is almost always available, except Saturdays, to issue the instructions discussed herein.

had been hired. But Diaz did not remain with Respondent. On the contrary he worked for Respondent on three different occasions, quitting twice. Esposito testified that Diaz had not quit but had merely taken time off on two occasions, remaining all the while an employee of Respondent. According to Esposito, the time off was occasioned by problems at home which sometimes took 2 to 3 months[58] to resolve before Diaz could return to work. Under cross-examination, however, Esposito acknowledged that when Diaz left the employ of Respondent the last time, he went to work for another company. I feel that Esposito's testimony was incredibly inconsistent on this matter. Either Esposito knew that Diaz had taken leave of Respondent for a few months to take care of personal matters at home or he knew that Diaz had quit his job, and had sought employment elsewhere. Company records would certainly have indicated how long Diaz had absented himself from the Company, yet Respondent offered none, thus indicating no particular concern on Respondent's part for an accurate record. And the transcript vividly underscores Esposito's, therefore Respondent's, total lack of interest in placing before the trier of fact a consistent story concerning the reasons for Diaz' absence from Respondent's plant.[59] One can not tell from Esposito's testimony why Diaz left Respondent's employ, whether it was temporary, for personal reasons, or permanent, in effect a quit. Thus:

> Q. Gamaliel Diaz had worked with Gurabo Lace on three different periods, had he not?
>
> A. Yes he has. He took some time off of the plant.
>
> Q. Q. He quit actually, he didn't take time off, didn't he?
>
> A. He took time off. He had a problem home.
>
> Q. When was that?
>
> A. All three times he was out. He went out two or three months and then he'd come back. . . .
>
> Q. The last time he left the company he went to work with another company, isn't that correct?
>
> A. He left the company for some time off.
>
> Q. He was working for another company and you know that don't you?
>
> A. Yes he went to work for another company because I had other people. I had another guy working in his place and I couldn't fire that guy. . . .
>
> Q. In the period [during which] he was not working for Gurabo Lace before he returned in . . . 1977, he was working in another company and you know that don't you?
>
> A. Probably was working in another place, I don't keep track.
>
> Q. So he was not just off taking care of his sick mother or something like that. He was working instead of working with your company?
>
> A. If he was working with other people he said he—he told me he was taking care of his sick mother.
>
> Q. You said he was out because he had personal problems?
>
> A. Okay, that's all.
>
> Q. Do you know what personal problems he had that he couldn't work with Gurabo Lace?
>
> A. I don't.
>
> Q. Did he ever tell you what the personal problems were?
>
> A. No.
>
> Q. When he came back for a job the last time at Gurabo Lace, you did not want him did you?
>
> A. I didn't say that. I said I couldn't take him right now because I had somebody else in his place.
>
> Q. Who did you hire in his place?
>
> A. I had another guy working in his place. I just can't throw the guy out and take on Gamaliel Diaz.
>
> Q. The guy was already working and he kept working?
>
> A. Right, I said give me some time.
>
> Q. So what did you do with him?
>
> A. With who?
>
> Q. With Gamaliel Diaz? Did you give him any kind of a job the last time he came for a job?
>
> A. No. I said give me some time and then afer awhile the guy quit. The guy I had in place [of Diaz] quit and I got Gamaliel Diaz [back].

From this testimony, particularly from the inconsistencies contained therein, I find that Esposito can not be credited wherever his testimony is at variance with that of other witnesses. Moreover, I conclude that when Diaz left the employ of Respondent, he was not considered to be on leave or still an employee of Respondent temporarily away from the job. He was considered to have quit his employment at Gurabo Lace. Thus, when he attempted to get his old job back in 1977, Esposito refused to terminate the employee previously hired to take Diaz' place as he would have done if Diaz were still considered to be an employee of Respondent temporarily on leave. Rather, Esposito treated Diaz on this occasion as an applicant for employment and refused to hire him. When the other employee quit later in the year, Esposito rehired Diaz as, quite obviously, a new part-time employee on the night shift with a starting date of 10/20/77.[60] The personnel records support this conclusion for on Diaz' personnel record it states: "Date started 10/20/77," not 1973. Miguel Hernandez' personnel record bears the starting date 2/11/76. Historically, therefore, Hernandez had been considered the more senior employee. This fact is evidenced also by an analysis of Respondent's timecards which reflect a general

[58] At times during his examination by the General Counsel, Esposito appeared confused as to the amount of time Diaz was away between his stints as an employee of Respondent. At one point he stated that Diaz was never away (out of Respondent's employ) for less than a year. Later, he reiterated that Diaz' absences were for 2 or 3 months. Still later he testified that the absences were for 4 or 5 months or "something like that." I can not and do not believe that company records could not have resolved this issue.

[59] Gerald Scher, Respondent's president, gave a sworn statement concerning the reason for the switch in shifts between Diaz and Hernandez. His reasons were based solely on seniority and generally paralleled Esposito's testimony to that limited extent.

[60] Diaz was given full-time employment in May 1978 when a second warping machine was purchased. He remained, however, on the night shift.

correlation[61] between the number assigned to each employee's timecard and the date on which that employee was hired. Thus, starting with Esposito, the plant manager, he was assigned No. 1 on his card. Nos. 2 through 7 were assigned in exact order of hire. From Nos. 8 to 15, if exceptions were made for the female employees and for an employee named Solivan, it would appear as though, generally speaking, employees with the longest tenure with Respondent had the lowest numbers on their timecards. On no occasion, that the record indicates, had any employee been reassigned a new timecard number prior to the September 1979 transfer of Gamaliel Diaz to the day shift and the transfer of Miguel Hernandez to the night shift other than in that month when Ana Diaz and Gamaliel Diaz were moved up one place from No. 13 to No. 12 and from No. 14 to No. 13, respectively, to fill in for J. Rodriguez who had left the employment of Respondent and who had been No. 12. In November, for no apparent reason, Gamaliel Diaz was moved from No. 13 to No. 2 passing everyone on the list of employees except Esposito. Why was Diaz given the No. 2 position? Esposito testified that the numbers assigned to employees' timecards meant nothing, that they were assigned at random. I find Esposito's testimony with regard to this matter equally as incredible as the rest of his testimony. For in this particular instance the changing of G. Diaz' timecard from No. 13 to No. 2 required not a single change but a change of almost everyone's timecard number. If the number assigned to a particular employee's timecard meant nothing, then why bother? As it finally ended up, the renumbering of the timecards resulted in 14 employees being assigned timecard numbers precisely in accordance with their date of hire,[62] without exception, provided one were to accept Respondent's assignment of a 1973 date to Gamaliel Diaz; Solivan's termination;[63] and Paniagua's new date of rehire 9/78. The question of why Respondent should suddenly decide to place all of its employees in a strictly numerical sequence in accordance with seniority at this particular time is open to conjecture. However, it would appear, absent any other logical explanation, that Respondent hoped to legitimize its decision to transfer Gamaliel Diaz to the day shift at the expense of Miguel Hernandez who was transferred to the night shift, and to further reward Gamaliel Diaz by making him number two in seniority, over and above every other employee with the exception of Plant Manager Joseph Esposito. It is apparent that, until the advent of the union campaign, the election and the postelection questions of the objection and challenge to Octavio Rodriguez' status and his role in the campaign, Respondent regarded Gamaliel Diaz as a fairly new employee, hired as of 10/20/77. As events unraveled during the critical period June through October 1979, Respondent found reason to reconsider its previous position with regard to Gamaliel Diaz' employment status. The reason for Respondent's redetermination of Diaz' seniority status will be discussed *infra*. Suffice it to say, that by all the evidence, both testimonial and documentary, when Scher advised Hernandez on September 18, 1979, that he was being transferred to the night shift and Gamaliel Diaz was being transferred to the day shift because Diaz had been with the Company longer, the reason given to Hernandez was false for it is patently clear that until Respondent determined to switch the shifts of the two employees involved, Respondent never considered Diaz to have seniority over Hernandez. The seniority argument proffered by Respondent to Hernandez on September 18 and later to the Board was fiction, pretextually used to support its decision clearly made for reasons not revealed at the time to Hernandez. The fact that Respondent should choose to offer such a patently transparent, pretextual reason for the change in shifts is clear evidence of an ulterior motive.

Esposito testified that the second reason why Diaz was transferred to the day shift and Hernandez was transferred to the night shift was that Diaz was capable of running both warping machines simultaneously while Hernandez was not. At the outset it should be noted that this reason was never mentioned to Hernandez when he was informed of his forced transfer to the night shift. Similarly, this reason was never mentioned by Scher in his affidavit dated October 22, 1979, given to the National Labor Relations Board agent investigating this case. On the contrary Scher told the investigator only that the transfers were the result of Diaz being the senior employee of the two. Clearly, there is here a belated shift in defenses warranting the conclusion that the second reason given was merely an afterthought concocted for purposes of the hearing and warranting the inference that the true reasons for the transfers were based on something other than the reasons proffered by Respondent, inferentially violative.

Aside from the above-discussed inferences there is available evidence in the testimony, or lack thereof, to warrant the conclusion that this second defense of Respondent concerning the transfers of Diaz and Hernandez is without merit. First of all it was generally conceded that the first shift is preferable to the second as far as the employees are concerned. Both Diaz and Hernandez preferred the day shift. Since the second reason offered by Respondent for the transfer of Diaz to the first shift concerned Diaz' ability to run two warping machines simultaneously, why was Diaz not called to testify to describe his alleged expertise. He would certainly be the most knowledgeable employee with regard to the subject and the most self-interested since it is his position on the first shift that is at stake. Failure of Respondent to call Diaz under these circumstances, without explanation, justifies the inference that, if he were called, he could not honestly support Respondent's contention.

Respondent relied primarily on the testimony of Esposito with regard to its contention that Diaz is a better

[61] There are a few aberrations in this general correlation which are not accounted for by testimony or documentation in the record. It may be that rather than move every employee up one number when an individual quit his job, Esposito, who was in charge of this bookkeeping duty, simply assigned the newly vacated number to the newly hired individual.

[62] As of may 1980.

[63] Prior to May 1980. The record is silent as to why Solivan quit or was terminated but just prior to his leaving Respondent's employ his timecard number was changed from No. 10 in May, July, and September 1979 to No. 13 in November 1979. This apparent loss of seniority may or may not have had something to do with his departure.

warper than Hernandez and can operate both warping machines simultaneously. Thus, Esposito testified that both he and Scher together decided to transfer Diaz to the day shift because "we needed Mr. Gamaliel Diaz because he had more experience and we've got more change-overs on the machines." Diaz was, according to Esposito, better at making changeovers on the warping machine and for this reason he was needed on the day shift. Though Scher was supposed to have made the decision, along with Esposito, to transfer Diaz for these reasons, Scher made no mention of Diaz' experience or his expertise at making changeovers though he dedicated almost a full page of his affidavit to the subject of why Diaz was transferred.

Esposito testified on the subject more fully elsewhere:

> We put Johnny [Diaz][64] on the first shift . . . because he knows more about machines and . . . because I can depend on him. He comes when I need him and he runs two [warper] machines. . . . So he's a better warper than Miguel, because he can run two machines at the same time and that makes it better for me because we can produce more.

Esposito testified further that, if Hernandez were to run only one machine on the first shift instead of Diaz running two machines, "Maybe we would have to stop or shut off the knitting machines because . . . if one [warping] machine runs, it doesn't produce enough to keep those 18 [knitting] machines running.

Again, I find Esposito's testimony lacking in credibility. Once again it should be noted that Scher did not mention in his affidavit any of these reasons for transferring Diaz. Moreover, Esposito's statement that he put Diaz on the first shift because he could "depend on him" is truly strange in light of the fact that Diaz quit Respondent's employ on three separate occasions and that, the last time Diaz tried to return, Esposito did not want to take him back at all. For these reasons and others discussed, *infra*, I do not credit Esposito's testimony as to the reasons for Respondent's decision to transfer Diaz.

Leonard Edelson also testified on behalf of Respondent with regard to this matter as follows:

> I would like to state that I have spoken to Joe Esposito and he has advised me that he needs Johnny [Diaz] on the first shift to work two warpers because Miguel says he can not. . . . Miguel says he can not work two warpers. The two warpers must be worked on the first shift because the girls[65] are on the first shift and they help with the changes that take place on the creel.

Thus, though Edelson testified that Miguel Hernandez had been asked by Esposito to work two warping machines and Hernandez had stated to Esposito that he could not do so, and that this information was passed on to Edelson, when Edelson sought corroboration on this point from Esposito, the following testimony was adduced:

> Q. (By Edelson): Have you asked Miguel if he will watch two warping machines? . . . . In other words, Joe, did you ever ask Miguel if he would work two [warping] machines?
>
> A. (By Esposito): No, I didn't.

Clearly, Edelson and Esposito had not compared notes. On the basis of the contradictory testimony of Edelson and Esposito, I find Respondent's position with regard to this defense unworthy of belief. More particularly, I find that Respondent never bothered to ask Hernandez whether he could or would work two warping machines simultaneously, a step which, under ordinary circumstances, would have been taken before transferring him to the night shift and transferring Diaz to the day shift since there is no indication in the record that Diaz had ever operated both warpers simultaneously in the past. The assumption that Diaz could operate two wrapers simultaneously but that Hernandez could not would have been just that—an assumption, hardly enough to warrant the transfer of both employees without the slightest investigation into the matter. Of course, Esposito testified that Diaz was the more experienced of the two but if this bald assertion were to be taken at face value, why then was Hernandez receiving a higher wage than Diaz. It is axiomatic that there is a positive correlation between performance and pay. I consider the testimony of Respondent's own witnesses on the subject incredible on its face.

But there was other testimony on the subject of Diaz' expertise or lack thereof and on his ability or lack of ability to work two warping machines simultaneously. Thus, Hernandez testified that since he first began working on the night shift on September 24, 1979, it has been his practice to report early, before the 3 p.m. starting time, and even earlier on Thursdays, payday, in order to pick up his check. He stated that on no occasion had be ever seen Diaz operate both warpers at the same time. Rather, he had seen him work on just one machine at a time, just as he himself had done. Hernandez testified credibly that an employee could watch two warpers at the same time but that doing so would cause too many problems since the threads break too often and, if the machines continue to run, which they frequently do because the automatic stop does not always work, a large hole can be created in the goods. In the absence of any testimony from any of Respondent's employees that he or she witnessed Diaz operate the two warper machines simultaneously; in light of Diaz' failure to testify on this subject; on the basis of Hernandez' credible testimony on the subject; because Esposito admitted that he never asked Hernandez if he would operate both warpers at once; and for the other reasons enumerated above, I conclude that Respondent's second, like its first, alleged reason for transferring Diaz to the day shift and Hernandez to the night shift, namely, because of Diaz' ability to run two warping machines at one time, is purely fictional

[64] Gamaliel Diaz, for some unexplained reason, is also known as Johnny Colon, and is referred to in the record frequently by that name.

[65] Isdoria Gomez and Ana Diaz, the female employees to whom Edelson was referring, were not called to testify. Edelson, as noted above, only visited the plant on two occasions between the time the petition was filed and the date of the hearing. His information concerning the work performed by Gomez and Ana Diaz is clearly second hand and I do not rely on it.

and that the true reason for the double transfer lies elsewhere.

The General Counsel alleges that the transfer of Hernandez to the less desirable night shift was in retaliation for his union activity and contends that this can be justly found because Hernandez was, in fact, active on behalf of the Union, because of the timing of the act of transfer and because the reasons set forth by Respondent for making the transfer are so patently pretextual. In my opinion, the General Counsel's argument is sound as far as it goes. For Hernandez had in fact signed a union card given to him by Rodriguez and I would find company knowledge as I had with Rodriguez and Paniagua, not only on the basis of the small-plant theory but also on the basis of Esposito's admission to Hernandez that "the boss had a list of names of the people who were going to vote for the union" and would layoff or suspend them after the election. I would also find that the timing of the transfer, the announcement of the same occurring as it did on September 18, the very day Rodriguez, Gomez, and Ana Diaz received their violative discharge warnings, is evidentiary of discriminatory motivation in that the transfer appears more likely to be a part of a pattern of discrimination aimed at all union sympathizers. The only question left unanswered by the General Counsel's theory is, why would Respondent punish Hernandez for signing a union card by discriminatorily assigning him to the less desirable night shift while at the same time rewarding Diaz, another union card signer,[66] by assigning him to the preferred day shift? Well, the answer is not all that difficult to provide. As noted earlier in this decision, Paniagua did the organizing of the night shift obtaining the signatures of Solivan and Diaz on union authorization cards. Although Esposito initially denied talking to Diaz about the Union, he ultimately admitted that he had a conversation with Diaz at the warper where Diaz was working before the election and that Diaz told him that Paniagua had forged his (Diaz') name to a union authorization card. Although Esposito testified that this was all that Diaz told him concerning union activities among the employees, I find it patently incredible that the entire conversation started and ended with this statement. It is quite apparent that Diaz, by informing Esposito about Paniagua's union organizing activity, while denying his own complicity therein, allied himself with Respondent's cause; namely, that of undermining the union campaign. It is quite apparent that Respondent had much to gain by transferring its informant to the day shift. First, the transfer was a reward for Diaz for informing Respondent of the union activities of its employees, Paniagua in particular, and possibly others. The information obtained from Diaz was acted upon the day after the election when Paniagua was unceremoniously laid off. Second, the removal of Hernandez from the first shift furthered Respondent's plan to separate Rodriguez from the other employees who might ally themselves with his and the Union's cause, a plan manifested quite clearly the very day of the announced transfer through the issuance of the three warning letters which threatened Isdoria Gomez and Ana Diaz with discharge for talking with Rodriguez. Third, the assignment of Diaz to Rodriguez' shift placed among the employees whom Respondent suspected of continued union activity and/or preparation of the Charging Party's case in the forthcoming representation case hearing, an informant upon whom it could rely to obtain further information as to their activity. I find Respondent's removal of Hernandez for these unlawful purposes violative of Section 8(a)(1) and (3) of the Act.

Paragraph 5(e) alleges that on September 18, 1979, Gerald Scher warned and directed an employee to refrain from giving any assistance or support to the Union and threatened said employee with discharge and other reprisals if he continued to give any assistance and support to the Union. The record clearly shows that on the cited date Scher told Rodriguez that, if Esposito caught him talking to the employees, he was authorized by Scher to fire him immediately. Since I have found that the warnings issued on that date, covering the same subject matter as Scher's statement, were designed to interfere with the Section 7 rights of Respondent's employees, I find that Scher's statement was likewise designed to obtain the same unlawful end. My reasons for so deciding are the same with regard to both findings. Respondent did, as alleged, violate Section 8(a)(1) with regard to Scher's September 18 oral warning to Rodriguez.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as I have found that employee Paniagua was discriminatorily laid off and when reinstated was given less employment than he previously had received and with less employment than he normally would have received, I shall recommend that Respondent be required to offer him full and immediate reinstatement and that Respondent be required to reimburse him both for lost wages due to the layoff and lost wages due to the decrease in hours worked,[67] with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[68]

[66] The card of Gamaliel Diaz Hernandez, otherwise referred throughout this decision as Diaz, was offered into evidence during the hearing and is part of the record.

[67] The record indicates that as of the date of the hearing Paniagua may have been reinstated to his previous position and former hours.

[68] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

I shall also recommend that Respondent be required to reinstate Miguel Hernandez to the day shift and to remove from the personnel files of Ana Diaz, Isdoria Gomez, and Octavio Rodriguez the warning notices issued to them on September 18, 1979.

CONCLUSIONS OF LAW

1. Gurabo Lace Mills, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union General de Trabajadores de Puerto Rico is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee with discharge of employees who voted for the Union, creating the impression that union activities of employees were under surveillance, and warning and directing an employee to refrain from giving assistance and support to the Union and threatening said employee with discharge for so doing, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By laying off employee Jesus Paniagua because of his union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By reducing the hours of employment normally made available to Jesus Paniagua following his reinstatement, because of his union activity, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. By transferring its employee Miguel Hernandez to a less desirable shift because of his union activities, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

7. By issuing final written warnings to employees Ana Diaz, Isdoria Gomez, and Octavio Rodriguez, in order to prevent them from participating in union activities or suspected union activities, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case and pursuant to Section 10(c) of the Act, I hereby issue the following recommeded:

ORDER[69]

The Respondent, Gurabo Lace Mills, Inc., Gurabo, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from discouraging membership in activities on behalf of or sympathies toward Union General de Trabajadores de Puerto Rico, or any other labor organization by:

(a) Threatening employees with discharge for voting for the Union.

(b) Creating the impression that union activities of employees are under surveillance.

(c) Warning and directing employees to refrain from giving assistance and support to the Union and threatening said employees with discharge for so doing.

(d) Laying off employees because of their union activities.

(e) Reducing the hours of employment of employees because of their union activities.

(f) Transferring employees to less desirable shifts because of their union activities.

(g) Issuing final written warnings in order to prevent employees from participating in union activities or suspected union activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Jesus Paniagua immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of his layoff, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Restore to Jesus Paniagua the hours of employment normally made available to him prior to his discriminatory layoff and make him whole for any loss of pay he may have suffered as a result of the reduction in his hours following his reinstatement, in the manner set forth in the section of this decision entitled "The Remedy."

(c) Transfer Miquel Hernandez to the first (day) shift.

(d) Remove from the personnel files of Ana Diaz, Isdoria Gomez, and Octavio Rodriguez the warning notices issued to them on September 18, 1979.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in complying with the terms of this Order.

(f) Post at its plant in Gurabo, Puerto Rico, copies of the attached notice marked "Appendix."[70] Copies of said notice, on forms provided by the Regional Director for Region 24, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall

[69] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[70] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.